**Should former clients of Nicola Gobbo (Lawyer X), imprisoned because of evidence adduced through Gobbo’s actions as a police informant, have their convictions overturned?**

The adversary system is fundamentally dependant on the fiducial relationship between client and lawyer, which has been substantially breached amidst the ‘Lawyer X scandal’. Nicola Gobbo – commonly referred to as ‘Lawyer X’ – was on the defence counsel for gangland and mafia members in Victoria whilst covertly informing against them to Victoria Police. In the 1983 decision *Baker v Campbell*, the notion of client legal privilege was clarified by the High Court, stating that “*without it,* *there can be no assurance that those in need of independent legal advice to cope with the demands and intricacies of modern law will be able to obtain it”* (ALRC, 1983). In other words, the certainty of lawyer-client confidentiality is essential if people accused of committing a crime are to have faith that they can disclose the relevant facts to their lawyer without it being used against them. Where it is used against them, this will likely amount to a “miscarriage of justice” (Wahlquist, 2020), which became the main reason for the acquittal of Frank Orman and is the basis of three appeals currently before the courts (Sweeney, 2020). So, if the courts were to give priority to this notion of ‘certainty’, then they would likely allow these appeals and many of the convictions secured because of Gobbo’s informing would be overturned. But to do so would perhaps risk the safety of the community by releasing potentially dangerous criminals back into society on the basis of a legal technicality. Thus, there is a tension between protecting the rights of the convicted and the rights of the wider community. Equally, there is a tension between trying to achieve certainty in the development and application of legal principles, and the possible need for courts to perhaps embrace flexibility by interpreting rules of evidence less strictly for the greater good.

It is argued that acquittals should be granted following the High Court of Australia’s ascertainment that Gobbo’s actions were contrary to the legal obligations owed to her clients and to the courts generally. The first finding was that her actions were inconsistent with the Australian Solicitor Conduct Rules which deem “the administration of justice is paramount and prevails to the extent of inconsistency with any other duty” (Legislation NSW, 2015). The rules are considered broken if “solicitors or counsel do not possess the objectivity and independence which their professional responsibilities and obligations to the court require of them” (Trove, 2019). Gobbo covertly exchanged material used to mount the prosecution cases against her clients inhibiting her ability to remain independent and thus violated her obligations and undermined the judicial system. The process to achieve acquittals for Gobbo’s former clients requires a judgement that “a substantial miscarriage of justice has actually occurred” and an assessment of whether the prosecution’s evidence satisfied a ‘beyond reasonable doubt’ verdict (Criminal Procedure Act 2009 (Vic) s 276(1). However, even in the circumstance that the court is not satisfied that ‘beyond reasonable doubt’ was achieved, the court has to assess whether there was a substantial miscarriage of justice. To find what accounts for a miscarriage of justice, reference can be made to *Lee v Queen* in which the High Court stated that “the prosecution should have enquired as to the circumstances in which the evidence came into its possession and alerted the trial judge to the situation, so that steps could be taken to ensure that the trial was not affected.” This acts as relevant precedent for former clients of Gobbo as the determination of fact in their respective trials was compromised due to the prosecution’s case being mounted on evidence illegally obtained and hidden from the trial judge. Essentially, *Lee v Queen* highlights the responsibility of the prosecution to present a case relying solely on evidence properly adduced, and subsequently, Gobbo’s former clients that have been prosecuted utilising information improperly provided by Gobbo may have the right to an acquittal. As a general principle, strict adherence to the doctrine of precedent achieves a degree of certainty and protects the rights of participants in legal disputes. That the law is applied consistently and predictably is necessary to fully realise the ‘rule of law’, an accepted component of which is the idea that all are equal before the law. There is a strong argument then for applying precedents like *Lee v Queen* to all of the cases where Gobbo informed on her clients to maintain a sense of certainty that the law is being applied consistently.

Additionally, the case *R v Szabo* acts as a precedent to assess whether Gobbo’s intimacy with the prosecution is grounds for an appeal. In that case, Szabo’s lawyer was in a de facto relationship with the prosecutor, and although the court found that there was “not a case of actual injustice”, it was held that a fair-minded observer could come to the *assumption* that there was a miscarriage of justice and so the conviction was overturned. As substantiated by the aforementioned precedents, the role of the prosecution is to mount a case entirely independent of the defence, whether in reality or perception. If this independence is perceivably compromised, then the defence has the obligation to inform the client of the relationship. Gobbo’s correspondence with the prosecution aided multiple cases and utilising the information provided amongst more than 5000 written reports from her information over a five-year period (ABC, 2020). As such, the Crown obtained this information unbeknownst to the defendant, subsequently blurring the distinction between the prosecution and defence roles and undermining the fundamental principles of the criminal justice system. Correspondingly, Gobbo’s professional and intimate relationship with Detective Senior Sergeant Argall was undisclosed despite Argall being the detective to initially sign Gobbo as an informant (Farsworth, 2019). Given their intimacy it would uprise the suspicion of an ordinary fair-minded observer that it interfered with a fair trial, amounting to “substantial miscarriage of justice.” The interrelationship between *rights* and *responsibilities* can be seen here. If the rights of defendants in the criminal justice system are to be upheld, lawyers involved in their dispute – both prosecution and defence – must exercise certain responsibilities. One of the most important responsibilities is to put aside any personal interest that might arise in the course of acting as a lawyer, to ensure that the rights of the defendant are upheld. Because it would seem that these responsibilities were not acted upon, many of Gobbo’s former clients may have the right to an acquittal.

Conversely, releasing notorious criminals, at least some of whom must surely be guilty of the crimes with which they were charged, defies the aim to protect society and maintain social cohesion. Currently the prosecution has identified twenty-two former clients who are supposedly eligible for an appeal, whilst Gobbo claims there were 386 people convicted utilising her information (Houston, 2019). Two of Gobbo’s prominent former clients are Antonis (Tony) Mokbel and Carl Williams who were both convicted drug traffickers and Gangland figures. Mokbel was responsible for The Company – a drug syndicate exporting billions of dollar’s worth of drugs, specifically cocaine, speed and ecstasy (ABC, 2019). Not only was he responsible for drug trafficking but multiple informants testified that he employed Carl Williams as a hitman (ABC, 2019). Mokbel is notorious for initiating havoc among the streets of Melbourne, diminishing social cohesion and hence, arguably requiring steps as dramatic as those taken by Gobbo and the police to stop him. As a result of Gobbo’s actions, it is feared that notorious and dangerous criminals such as Mokbel will be released. It then begs the question of whether maintaining peace and eradicating crime off the streets is of upmost importance or whether adhering to a professional legal obligation is more favourable? Many have described Gobbo’s actions as ‘Noble Cause Corruption’, where immoral means are taken in order to achieve a desirable result (Wahlquist,2020). Detaining people who were perpetrating the Gangland murders, diffused a ‘war’ that resulted in the deaths of over 30 people (Sutton, 2016). The commercial distribution by The Company and alike drug syndicates became the source of Melbourne’s speed, MDMA and cocaine possession. In a recording intercepted by the Police, Mokbel was caught “telling an associate he had sold one 25kg tub of pseudoephedrine for $500,000 and that he had 21 of them left” (Moor, 2012). This was having widespread ramifications to all those who obtained the illicit substances due to the distribution orchestrated by the drug syndicates. Ultimately, the case mounted by the prosecution satisfied a beyond reasonable doubt verdict. Thus, betrayal to the fundamental underpinnings of the criminal justice system due to Gobbo’s deception sustained a prosecution case that held Mokbel and other criminals to account for their criminal activity. In summary, the noble cause corruption supported social cohesion by helping bring an end to the gangland wars and the associated drug syndicates, and hence the acquittal of these criminals would counteract the desirable outcome achieved. Excusing this instance of ‘noble cause corruption’ would require the law to embrace flexibility over certainty and to prioritise the rights of the wider community over the rights of Gobbo’s former clients to be convicted solely on the basis of admissible, legally-obtained evidence.

It can be deduced that the granting of acquittals for Gobbo’s former clients is dependent on an assessment of whether Gobbo’s actions in their respective trials constituted “a substantial miscarriage of justice”. Currently a potential 387 former clients of Gobbo’s are eligible to apply for an appeal and some will meet the requirements to achieve an acquittal, as observed with Frank Orman’s recent successful appeal. Orman’s conviction was overturned following the publication of Gobbo’s role as an informant. This acts as a precedent for following cases, however the disparity will occur when appeal judge have to assess whether there is sufficient evidence to allow a retrial, or even whether the convicted person has already served a sufficient sentence (Australian Associated Press, 2019). It is trite that the actions undertaken by Gobbo have illuminated the overarching systemic shortcomings of the Victorian Police and adequate measures are required to compensate. However, given the varying degree of information provided to aid the prosecution’s case, it becomes illogical to have a blanket rule, thus the only plausible option is to tediously assess each case on an individual basis. Efficiency might have to be compromised to support fairness, or put another way, flexibility embraced rather than a blanket or ‘certain’ rule being applied to all 387 matters. In order to be entitled to an acquittal, first there must be an assessment of whether a violation to section 158 (2) of the *Criminal Protection Act 1921* has occurred. If the contents of the case were on the contrary to any three of the clauses, this triggers an entitlement to an appeal. Predominately, appellants in the Gobbo scandal will gravitate towards section 2, “a substantial miscarriage of justice”, which requires the appellant to justify that Gobbo’s actions blurred the distinction between the prosecution and defence such that a fair-minded individual might entertain suspicion that there had been a miscarriage of justice. Once these requirements have been fulfilled, it satisfies an acquittal. Subsequently, these acquittals could re-introduce havoc as observed by the tendency of Mokbel and likeminded criminals to return to their illegal ways once released. Nonetheless, the integrity of the criminal justice system and the Victoria Police is imperative to restore along with the trust associated that an individual will receive a fair trial. The optimal solution is to investigate whether Gobbo’s interference has constituted the requirements for an acquittal in respect of each and every one of her convicted clients, despite the adverse consequences associated. As such, the rights of Gobbo’s former clients must be prioritised so that, in the longer term, there can be faith in the legal profession, Victoria police, and the wider criminal justice system. It is conceded that this would be an expensive process and that community safety might also be jeopardised through the potential release of dangerous criminals, but it is necessary to restore a sense of certainty that the rights of participants in the justice system will always be protected.

**References**:

Australian Broadcasting Corporation (2020). *Carl Williams, Nicola Gobbo and Tony Mokbel.* < <https://www.abc.net.au/news/2020-02-07/generic-graphic:-carl-williams,-nicola-gobbo-and-tony-mokbel/11942310?nw=0>>. Accessed 3 September 2020.

Criminal Procedure Act (2009). *Determination of appeal against Conviction*. s 276(1).

< <http://www5.austlii.edu.au/au/legis/vic/consol_act/cpa2009188/s276.html>>. Accessed 12 September 2020.

Farnsworth, S. (2019). *Nicola Gobbo, aka Lawyer X, had intimate relationship with police officer who first signed her up as informant*. < <https://www.abc.net.au/news/2019-04-01/police-officer-admits-intimate-relationship-with-lawyer-x/10959990>>. Accessed 20 September 2020.

Houston, C. (2019). *The harder they fall: Nicola Gobbo, from gangland lawyer to family outcast.* < <https://www.theage.com.au/national/victoria/the-harder-they-fall-nicola-gobbo-from-gangland-lawyer-to-family-outcast-20190301-p5113d.html>>. Accessed 2 September 2020.

Law Council Of Australia (2017). *Client Legal Privilege*. <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/client-legal-privilege>. Accessed 2 September 2020.

Moor, K. (2012). Tony Mokbel’s drug connections. <<https://www.heraldsun.com.au/news/law-order/tony-mokbels-drug-connections/newsstory/4362966e4a36961f72877f5649a4aec9?sv=58faef82768cf807b4bfaa462a5cca2>>. Accessed 18 September 2020.

Napier, J. (2019). *Conflicting loyalties: a miscarriage of justice?: The case of lawyer X. v.41, no.4, May 2019, p.18-21,45*. Accessed 3 September 2020.

Sutton, C (2016). *Twelve years, 36 bodies: The 12-year gangland war between crime families and the Mafia that turned the streets bloody and Melbourne into a city of fear*. <https://www.dailymail.co.uk/news/article-3492643/Twelve-years-36-bodies-gangland-war-crime-families-mafia-turned-streets-bloody-Melbourne-city-fear.html>. Accessed 12 September 2020.

Sweeney, K. (2020). *Lawyer X Nicola Gobbo’s appeal list grows*. <https://www.barossaherald.com.au/story/6753767/lawyer-x-nicola-gobbos-appeal-list-grows/?cs=7>. Accessed 29 July 2020.

Taylor, J. (2020). *Nicola Gobbo explains why she became Lawyer X and informed for police*. < <https://www.abc.net.au/news/2020-09-09/nicola-gobbo-why-she-became-lawyer-x/12618940>>. Accessed 7 September 2020.

The Law Society of New South Wales (2015). *Duties to clients: confidentiality*. <https://www.lawsociety.com.au/for-the-public/going-court-and-working-with-lawyers/solicitor-client-relationship/solicitors-duties-to-clients>. Accessed 30 July 2020.

Vedelago, C. (2020). Gobbo complaints have 'air of unreality', says royal commission lawyer. < <https://www.theage.com.au/national/victoria/gobbo-complaints-have-air-of-unreality-says-royal-commission-lawyer-20200928-p5601n.html>>. Accessed 28 September 2020.

Vinall, F. (2020). Lawyer X cop to be named in ‘one of the greatest scandals of our time’. < <https://www.news.com.au/national/victoria/courts-law/lawyer-x-cop-to-be-named-in-one-of-the-greatest-scandals-of-our-time/news-story/71f853a076214853ef31531ff9d180c6>>.

Wahlquist, C. (2020). *Lawyer X: how Victoria police got it 'profoundly wrong' with informant Nicola Gobbo*. <https://www.theguardian.com/australia-news/2020/sep/05/lawyer-x-how-victoria-police-got-it-profoundly-wrong-with-informant-nicola-gobbo>. Accessed 5 September 2020.

Woodhouse, P. (2020). Lawyer X: from the perspective of a criminal defence lawyer. < <https://aulich.com.au/lawyer-x-update/>>. Accessed 10 September 2020.

Younger, E. (2017). *Hitman hired by Carl Williams, Stephen John Asling, jailed for gangland figure's murder*. <<https://www.abc.net.au/news/2017-04-21/stephen-john-asling-sentenced-gangland-graham-kinniburgh/8460424>>. Accessed 10 September 2020.